

**EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD  
AT ITS MEETING ON MARCH 8 AND 9, 2007**

**MINUTE NO. 13     Request to Conduct an Aquatic Life Use Attainability Analysis for  
Straight Creek, Lee County**

Alan Pollock (DEQ Office of Water Quality Programs) made the staff presentation regarding a request from the Virginia Coalfields TMDL Group to conduct a Use Attainability Analysis for Straight Creek, Lee County. The request is contained in a document, dated October, 2006, entitled "Reasonable Grounds Documentation to Conduct an Aquatic Life Use Attainability Analysis for Straight Creek, Lee County." This documentation asserts that attainment of the designated use for aquatic life in Straight Creek is not feasible because many of the impacts on the watershed are irreversible.

Mr. Pollock explained that this document was submitted in accordance with a new section in the Code of Virginia, adopted by the 2006 General Assembly, which allows for an aggrieved party to submit reasonable grounds indicating that the attainment of the designated use for a water is not feasible, then the Board, after public notice and comment, may allow the aggrieved party to conduct a use attainability analysis according to criteria established pursuant to the Clean Water Act and a schedule established by the Board. The law also allows, if applicable, for the schedule to address whether TMDL development or implementation for the water should be delayed.

Mr. Pollock provided some background describing what a Use Attainability Analysis, or UAA, is and the regulatory options that are available based upon the results of the study. Virginia has never proceeded to remove an aquatic life use, although subcategories for the aquatic life use have been established for the Chesapeake Bay. There also have been about five requests for variances for chlorine and ammonia, although only one was approved, but that discharger is no longer in operation.

Federal and state regulations include very specific criteria that must be followed when dealing with changes to designated uses, such as:

- The Board may not remove an existing use
- The Board may not remove a use if the use will be attained by implementing technology-based effluent limits for point sources or by implementing cost-effective and reasonable BMPs for non-point source control
- Uses in downstream waters must be protected

Conducting a UAA study is not a regulatory action. After the UAA is completed, if the decision is to move forward, then any change to the standards need to go through the regulatory process in accordance with the VA Administrative Process Act, and also be approved by EPA

A notice of public comment on the proposed request to conduct a UAA study in Straight Creek was published in the Virginia Register on October 5, 2006. The comment period ended November 9, 2006.

Comments from thirteen groups were received and summarized in the Board memo. The environmental organizations urge DEQ to demand more objective information from the Group. They also expressed concern that the aquatic life use is an existing use which cannot be removed. The regulated community asked the Board to move forward and allow the UAA to be conducted. Based upon a stakeholders meeting on January 26, 2007, the Coalfields Group provided additional information on February 2 to supplement their initial submission.

In the documentation submitted by the Coalfields Group they highlight available information showing that human caused conditions and hydrologic modifications may be limiting the attainment of the designated use and therefore, conducting a UAA study is warranted.

Mr. Pollock reported that DEQ staff has worked closely with staff from the Department of Mines, Minerals and Energy throughout the process of developing the TMDL for Straight Creek, and in reviewing this proposal for conducting a UAA study on Straight Creek. DMME has the permitting authority for dischargers from coal mining operations.

DEQ also discussed this proposal with EPA Region III staff. They indicated that EPA allows third parties to conduct UAA studies without any presentation beforehand that reasonable grounds exist that attaining the designated use is not feasible. From their initial review of the proposal, EPA indicated it was “a pretty decent, thorough proposal”. They were impressed that the Group proposes to put together a public participation plan for the UAA study. EPA also indicated if the UAA study is pursued, they would like to be involved and kept apprised as the study moves forward.

DEQ and DMME staff believes that implementation of cost-effective and reasonable best management practices as well as improvements in operational practices for permitted facilities will result in significant improvement of water quality conditions in Straight Creek. The agencies would have some concerns about conducting a UAA for Straight Creek, prior to any corrective actions having been implemented following the TMDL. Therefore, staff favors the approach in the proposal that implementation would proceed concurrently with the UAA study.

Also, the agencies concur that there is some degree of uncertainty with respect to the level of aquatic life use that can be supported by Straight Creek.

This is the first proposal submitted under Virginia’s new law, so there are no criteria established for setting the “reasonable grounds” test for whether attainment of a designated use is feasible.

Mr. Pollock reported that in staff’s view proceeding with the study has several advantages:

1. It will provide additional information to DEQ about aquatic life use in Straight Creek;
2. It can help to identify the cost-effective and reasonable BMPs that apply to Straight Creek and to provide some incentive for their implementation; and,
3. It was the TMDL process for Straight Creek and the concerns and controversy it raised, that became the impetus behind the adoption of this new section in the VA Code. Thus, conducting this study on Straight Creek will also help in defining the framework for future UAA studies under the new law.

One individual indicated an interest to speak before the Board. Mike Gerel, with the Chesapeake Bay Foundation, indicated their opposition to allowing the UAA study to proceed at this time prior to full implementation of pollution reduction actions. He also indicated concern that the Board may receive many other requests for UAA studies for the purpose of lower water quality standards in lieu of implementing needed management actions to improve water quality.

After the staff presented its recommendation, the Board agreed, prior to taking a vote on the recommendation, to modify the wording in the first condition to read as shown below.

### **Recommendation**

Staff proposes the Board grant approval, subject to the conditions listed below, for the Virginia Coalfields TMDL Group to conduct a use attainability analysis for aquatic life in Straight Creek according to criteria established pursuant to the Clean Water Act and in conformance with 9 VAC 25-260-10 of the Virginia Water Quality Standards.

1. A TMDL Implementation Plan to address the aquatic life use impairment shall be submitted to DEQ by December 31, 2007 and approved by the Board. The Plan must identify the reasonable and cost-effective remediation steps required for use attainment under 9 VAC 25-260-10 subsections E and I.
2. A UAA study plan shall be presented for public comment and approved by DEQ before initiation of the UAA study.
3. On-going implementation of cost-effective and reasonable best management practices identified in the TMDL Implementation Plan and VPDES permits shall continue so the response of the aquatic system to the implementation of these practices is included in the UAA study.
4. Upon completion of the UAA study, DEQ staff will report back to the Board whether the results of the UAA study are deemed consistent with federal and state regulations and warrant initiating a rulemaking to establish subcategories of the designated use for aquatic life in all, or portions of, Straight Creek.
5. Moving forward with this study does not establish any precedent for what constitutes "reasonable grounds" under § 62.1-44.19:7 of the Code of Virginia.

### **Board Decision**

The Board voted in the majority [6 to 1, Mr. Thompson voting no] in favor of the motion to accept the staff recommendation with amendment.

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Director  
Division of Water Quality Programs